MAHFUZ HASHIM

v.

KOPERASI PEKEBUN KECIL DAERAH SEGAMAT; RASHID OMAR & ANOR (THIRD PARTY)

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CIVIL SUIT NO: 23(25)-37-1991]
21 MARCH 2005

UNINCORPORATED ASSOCIATIONS: *Societies - Co-operative society - By-laws - Power to execute agreement - By-laws granting power to board of directors - Contract with plaintiff signed by chairman and manager of society - Whether valid - Whether binding on society - Royal British Bank v. Turquand - Whether could be relied upon by plaintiff - Indemnity - Whether available to society*

The third parties herein were the chairman and manager, respectively, of the defendant co-operative society. On 20 February 1990, the third parties, on behalf of the defendant, executed an agreement with the plaintiff to purchase 500,000 rubber seedlings from the latter ('the agreement'). Subsequently, however, the defendant terminated the agreement, allegedly for reasons that the agreement had contravened the defendant's by-laws (not being sealed and signed by the chairman, secretary and manager of the defendant), and that the third parties, in so executing the agreement, had not obtained the approval of the defendant's board of directors ('the board') and therefore had no authority to sign the same. The ensuing dispute resulted in the plaintiff suing the defendant for general damages (RM175,000), and the defendant suing the third parties for an indemnity thereof. Before the learned judge, questions arose as to whether the agreement was valid, and hence binding on the defendant, and in any case: (i) whether the plaintiff, who was a member of the defendant, could rely on the rule in *Royal British Bank v. Turquand* ('the Turquand rule') (thereby enabling him to assume that the third parties had the necessary authority to execute the agreement); and (ii) whether the third parties had the authority to execute the agreement and were liable to indemnify the defendant.

Held (allowing the plaintiff's claim and the claim for indemnity):

[1] It was not clearly specified in by-law 45(r) that an agreement must be sealed with the common seal and signed by three signatories. Hence, it would not be right to say that the by-laws had put the plaintiff on notice of the required seal and three signatories. (p 420 a)

[2] The evidence showed that the defendant had in the past entered into written contracts similar to the agreement, that the persons usually empowered to sign contracts for the defendant were the manager or the secretary, that the common seal was not required to be affixed on those contracts, and that there was no instance of the board rejecting such contracts as entered into by the manager. (p 420 g)

[2a] It must therefore appear that the manager was the most influential, if not the most powerful figure in the hierarchy of the defendant. Given so, it could not have appeared to the plaintiff that the offer from the manager (to execute the agreement) could yet lack the approval of the board. In fact, given the special position of the manager, it could only be logical and natural to assume that all were being done regularly. And the fact that it was the chairman of the board who executed the agreement could only doubly assure the plaintiff that all were done regularly. All things said, there was no circumstance that ought to put the plaintiff to inquiry. The Turquand rule hence applied and accordingly the plaintiff's claim was allowed. (pp 420 h & 421 a-d)

[3] The plaintiff had given a detailed breakdown of his cost, and was not challenged on that. There was also no evidence on the cost from the other parties. It would work therefore that there was no material to disagree with the plaintiff. (p 421 f)

[4] Reading together by-laws 48 and 50(1), there was no power to the chairman or the manager to execute an agreement without the prior approval of the board. In the absence of such express power, they must be held liable to the defendant and must pay the latter the sum of RM175,000 by way of a full indemnity. (pp 421 h & 422 a-c)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors [1995] 3 CLJ 639 CA ***(refd)***

Barqate v. Shortridqe [1855] 5 HL Cas 297 ***(refd)***

Chase Manhattan Bank NA v. Mercantile Co-operative Thrift & Loan Society Ltd [1992] 2 MLJ 168 SC ***(refd)***

Hely-Hutchinson v. Brayhead Ltd [1968] 1QB 549 ***(refd)***

K Sivapraaasam Krishnar v. Renominium Development Sdn Bhd & Ors [1998] 4 CLJ 481 CA ***(refd)***

Malaysian Resources Corporation Bhd v. Juranas Sdn Bhd [2002] 7 CLJ Supp 260 HC ***(refd)***

MMC Power Sdn Bhd & Anor v. Abdul Fattah B Mooawan & Anor [2001] 1 CLJ 207 CA ***(refd)***

Morris v. Kanssen [1946] AC 459 ***(refd)***
Pekan Nanas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***
Re British Provident, Life & Assurance Society, Grady's Case [1863] 1 De GJ & Sm 488 ***(refd)***
Re Hampshire Land Co [1896] 2 Ch 743 ***(refd)***
Rolled Steel Products (Holdings) Ltd v. British Steel Corp [1984] BCLC 466 ***(refd)***
Royal British Bank v. Turguand [1855] 5 E & B 248 ***(refd)***
Standard Chartered Bank v. Central Wood Tiles Sdn Bhd [1990] 2 MLJ 361 HC ***(refd)***
Tan Ah Tong v. Perwira Habib Bank (M) Bhd [1998] 3 CLJ 833 CA ***(refd)***
Tan Chiw Thoo v. Tee Kim Kuay [1997] 2 MLJ 221 ***(refd)***
Young v. David Payne & Co [1904] 2 Ch 608 ***(refd)***

Other source(s) referred to:
Palmer, *Company Law*, 23rd edn, pp. 343-346
Pennington, *Company Law*, 2nd edn, pp. 137-138
Walter Woon, *Company Law*, 2nd edn, pp. 89-90

For the plaintiff - Pang Hock Leong; M/s CC Aiyathurai & Co
For the defendant - A Sethu; M/s Syarikat A Sethu
For the third parties - Azmi Juewani; M/s Azmi Juewani & Assocs

Reported by WA Sharif

JUDGMENT

Jeffrey Tan J:

There are two claims in this action; one by the supplier (plaintiff) of rubber seedlings against his *Koperasi* purchaser (defendant) for general damages (since capped by the plaintiff to RM175,000), and the other by the defendant against the third parties for a full indemnity against the claim of the plaintiff.

The background facts may be summarised as follows. By a written agreement [P1(3 - 40) - agreement] dated 20 February 1990, the plaintiff agreed to supply and the defendant agreed to purchase 500,000 rubber seedlings, at the price of RM0.85 per seedling. That agreement was unilaterally terminated by the defendant, by its letter dated 12 May 1990 [P1(41)] which stated that the agreement was entered without compliance with the by-laws of the defendant; the letter did not state the particular by-law that was allegedly offended. But in its amended statement of defence, the defendant pleaded that the agreement was executed by the third parties (who were respectively then the chairman and manager of the defendant) without the knowledge (persetujuan) and or authorization (kebenaran) of the board of directors (board), that the third parties had not complied with by-law 45(r) and that the agreement was therefore not valid, and that the plaintiff was a member of the defendant cooperative and

was fully cognisant of the by-laws of the defendant. In their joint statement of defence to the third party claim, the third parties pleaded that the 2nd third party was empowered to execute the said agreement on behalf of the defendant and that the 1st third party was only a witness to the execution of the agreement by the 2nd third party.

The agreed issues, which were settled after trial had long begun, still a case of better late than never, were as follows.

(1) Whether the rule in *Turquand* applies, given the agreed fact that the plaintiff was a member of the defendant society; in the event that the court finds so, then the court shall find that there was a binding agreement, shall find liability against the defendant and award damages; in the event that the court finds not so, then the court shall proceed to issue (2).

(2) Whether the chairman by himself and without the prior sanction or approval of the board of directors could sign the agreement: in the event that the court finds not so under the by-laws, then the court shall further find that the agreement was not binding on the defendant.

(3) Notwithstanding whatever finding on issue (1), the issue as between the defendant and third parties is whether the chairman could execute the agreement without the prior sanction of the board of directors: in the event that the court finds in favour of the plaintiff, and in the further event that the court finds that the chairman could not sign the agreement without the sanction of the board of directors, then the court shall order the third parties to indemnify the defendant for any award that would be made against the defendant in favour of the plaintiff.

The bundles of documents were separately tendered (P1 by the plaintiff, D2 by the defendant, D4 & D5 by the third parties), but by consent were admitted without formal proof subject only to cross-examination. As for the oral evidence, even that subsequently rendered outside the scope of the agreed issues, it was as follows.

The plaintiff (PW1) testified that he was a member of the defendant cooperative. P1(1-2) was the defendant's offer dated 8 February 1990 to him to supply 500,000 seedlings at RM0.85 per seedling. He accepted the offer and signed the agreement [P1(3 - 40)]. The third parties signed on behalf of the defendant. He proceeded to prepare a nursery; he cleared his land of 4 acres of rubber trees. After he received the letter of termination, he contacted the [then] manager of the defendant. "Tidak dapat persetujuan yang dicapai.

Saya terpaksa menerima pembatalan tersebut." The rest of the evidence-in-chief of the plaintiff concerned his alleged general damages of RM175,000 (see pp. 5 and 6 of the notes of proceedings). Under cross-examination by Mr A Sethu for the defendant, the plaintiff affirmed as follows. He was and remained a member of the defendant cooperative. He had a copy of the by-rules of the defendant. The common seal of the defendant and the signature of the secretary of the defendant were not affixed on the agreement. "Semasa menandatangani perjanjian tersebut, Pengurus Koperasi ada memberitahu saya bahawa beliau dan pengerusi ada kuasa untuk tandatangan perjanjian tersebut, Pengurus seorang yang memberitahu saya ... Saya rasa mereka ada kuasa." After he received the letter of termination, he had a meeting with the manager. That meeting did not reached a solution. Under cross-examination by Mr Azmi Juewani for the third parties, the plaintiff agreed that the claimed profit of RM0.35 per seedling was an estimate. The plaintiff related that the clearing works to prepare the nursery took about a month to complete, and that the felled rubber trees were 8 years old. Before the said agreement, he had received one similar contract from the defendant, and that he performed that contract without a hitch.

DW1, the secretary of the defendant cooperative, testified as follows. He became the secretary in 1985. He had no knowledge of the offer or agreement. The offer and agreement should have been approved by the board, but were not brought before the board. Under by-law 45, it was the board that was empowered to act for the defendant. The common seal of the defendant and the signature of the secretary were not affixed on the agreement. He attended the meeting of 26 March 1990 [(see D2(68 - 72)]. At that meeting, the board decided to cancel the offer and agreement, as both had not been approved by the board. The board decided to leave the matter to the Rubber Industry Smallholder Development Authority (RISDA), the advisor of the defendant. On 12 May 1990, he issued the letter of termination.

Under cross-examination by Mr. Pang Hock Leong for the plaintiff, DW1 said that a payung project need not necessarily be offered to a member of the defendant, but a member of the defendant had priority. At the meeting of 26 March 1990, he learned of the agreement. The advice of RISDA was given at that meeting. "Surat-surat harian berkaitan dengan perjalanan koperasi ditandatangan oleh Pengerusi Koperasi." DW1 agreed that the letter of termination was sent on the 12 May 1990 due to negotiations to resolve the dispute. DW1 disagreed with counsel who suggested that the agreement was terminated because the board believed the 1st third party had a personal interest and not because of the by-laws. Under cross-examination by Mr. Azmi,

DW1 said that he could not remember if he had signed any prior contracts for the supply of seedlings. DW1 disagreed with counsel who suggested that the agreement was cancelled for the reasons stated in the minutes [(a)(i), (a)(ii), or (a)(iii)] of the meeting and or because RISDA would not purchase the seedlings from the defendant cooperative. In the past, RISDA had given out contracts for the supply of seedlings to members of the defendant. Towards the performance of those contracts, the defendant would appoint a contractor. After the seedlings had been supplied [to the defendant], RISDA would purchase those seedlings from the defendant and distribute them to smallholders. RISDA would purchase the seedlings at a price higher than that paid by the defendant. On the resale to RISDA, the defendant would make a profit. "Saya tidak ingat samada sebelum perjanjian tersebut, terdapat perjanjian lain. Sebenarnya memang tidak ada perjanjian lain. Ini pertama kali kontrak untuk membekalkan benih getah dibuat secara tertulis. Ini adalah kali pertama konsep payung ditermapakai oleh RISDA." After the termination of the agreement, (i) the payung concept was not employed again, (ii) contracts were not entered again with any contractor, and, (iii) RISDA did not again appoint contractors. DW1 disagreed with counsel who suggested that a contract for the supply of seedlings did not require the approval of the board. DW1 disagreed with counsel who suggested that it was the usual practice that the manager had the authority to appoint a contractor and or that "adalah menjadi amalan bahawa koperasi tidak menyediakan perjanjian atas kontrak yang ditawarkan oleh koperasi". Under re-examination, DW1 said that RISDA was the advisor to the defendant, and that the agreement was terminated on the advice of RISDA.

DW2, the RISDA officer in Segamat between 1989 and 1992, testified as follows. Under the payung concept, RISDA would ascertain the number of rubber and oil palm seedlings required by smallholders, and then confer with contractors/suppliers. RISDA would settle the price, identify the contractor, access the capability of the contractor to supply, and then make a formal offer. The defendant was one of the contractors/suppliers identified under the payung concept. "RISDA pernah membuat tawaran kepada koperasi untuk menjadi pembekal benih. Melalui tawaran tersebut, koperasi dikehendaki melakukan penanaman benih di tanah kepunyaan RISDA di ladang Getah Kg. Sekijang, Segamat." He attended the meeting of 26 March 1990. He informed that meeting that RISDA could not purchase that amount of seedlings, and that the defendant would therefore incur a loss (see p. 26 of the NP). "RISDA tidak membuat keputusan kerana koperasi ada Ahli Lembaga. Terpulang kepada Koperasi untuk membuat keputusan." Under cross-examination by Mr. Pang, DW2 related that prior to the payung concept, RISDA would supply all required seedlings from its own nursery or from contractors.

Pursuant to RISDA Directive 50/89, members of cooperatives were given priority for appointment as contractor/suppliers. The amount of seedlings required was determined by RISDA. DW2 agreed that RISDA would purchase all seedlings, if RISDA had given an offer to a cooperative to supply seedlings. After Directive 50/89, RISDA continued to supply seedlings from its own nursery. He advised the meeting to terminate the agreement, as the agreement was not within the payung concept and RISDA would not guarantee that it would purchase the seedlings (see p. 29 of the NP). Under cross-examination by Mr Azmi, DW2 said that the 1st third party was the manager of the defendant at the material time. DW2 admitted that he was not aware if the RISDA officer in Segamat had instructed the defendant to implement the payung concept. RISDA directive 5/90 directed that priority be given to the implementation of the payung concept. It was the procedure that his officers as managers of cooperatives would report to him and take further instructions from him. The agreement was in the format of the agreement employed by RISDA. An offer under the payung concept would by made by RISDA headquarters. The instant agreement was given under the payung concept. Under re-examination, DW2 said that the instant agreement was not made with RISDA.

The 1st third party (PK1) testified as follows. Between October 1988 and February 1990, he was the manager of the defendant cooperative. He prepared the agreement in P1(3 - 40). It was an agreement for the supply of 500,000 seedlings by the plaintiff to the defendant. "Anak benih akan disalurkan kepada RISDA." RISDA would purchase the seedlings from the defendant at the price of RM1 per seedling. The defendant would make a profit of RM0.15 per seedling. The agreement was signed by the 2nd third party on behalf the defendant. He witnessed the execution of the agreement. The defendant had not entered into a similar [written] contract. The agreement was the first [written] contract of the defendant. In the past, the defendant had engaged other contractors, but without written contracts. He prepared the agreement according to the format of agreement employed by RISDA. In the administration of the defendant, the manager was given the power to appoint contractors. He issued the offer to the plaintiff. He appointed the plaintiff, as the plaintiff was a member of the defendant, had undertaken similar contracts for the defendant, and had the land to set up a nursery. Tenders were not called. It was not the practice to call tenders. It was not the practice to obtain the approval of the board. The power to appoint contractors was vested with the manager. That was the practice before his time. He was an employee of RISDA. In October 1988, he was appointed as the manager. Cooperatives were an activity of RISDA. His salary was paid by RISDA. The directive in RISDA directive 5/90 was to implement the payung concept. Pursuant to

RISDA directives 50/89 and 5/90, he appointed the plaintiff as a contractor to supply seedlings to the defendant. The figure of 500,000 seedlings was reached after he had conferred with Zulkifli bin Zaini, the RISDA officer in Segamat in charge of supply, who informed him that in 1991 RISDA would require 1,000,000 seedlings for the district of Segamat. "Pelaksanaan perjanjian tidak perlu dibawa ke Lembaga." On 28 February 1990, he ceased to be the manager. The common seal was not required to be affixed on the agreement.

Under cross-examination, PK1 maintained that he had the power to give the agreement in Pl (3-40). In 1986, the defendant had given a similar contract to the plaintiff. The defendants had appointed other contractors. Contracts had been given out by managers. The agreement was the first case of a written contract. All contracts had the approval of the board. It was not true that the board had objected to contracts being given to contractors. In February 1990, he ceased to be the manager. Until then, there were no objections to the agreement. Under cross-examination by Mr Sethu, PK1 said that RISDA appointed him as the manager. He had complied with the by-laws of the defendant. "Saya tak pasti samada saya pernah mendapat kelulusan Lembaga di dalam kerja-kerja saya sebagai manager". PK1 disagreed with counsel who suggested that the management powers were vested with the board. PK1 said that written contracts were more desirable. Written contracts had not been employed when he took over as manager of the defendant. He did not want the next manager to face the problems he had to face. PK1 agreed with counsel who said that the board had not approved the agreement. Under re-examination, PK1 said that prior approval of the board was not required as he had the powers to give the contract to the plaintiff.

The 2nd third party (PK2) said that he was the chairman of the defendant at the material time. As chairman, he had signed the agreement on behalf of the defendant. He had the powers to sign the agreement. He had not signed such an agreement before. Under cross-examination by Mr Pang, PK2 said that he was the chairman for three years, from 1989 to 1991. The activities of the defendant were managed by the manager. The 1st third party had the power to sign the agreement. Whilst he was the chairman, the defendant had not objected to the agreement. Under cross-examination by Mr Sethu, PK2 maintained that as chairman he had the powers to sign the agreement. PK2 could not remember whether there had been a prior meeting to approve the agreement. He forwarded the agreement to the management (pengurusan). Under re-examination, PK2 said that the board would usually meet about 3 to 4 times a year. "Ada perkara yang tidak dimaklumkan kepada lembaga, perkara biasa. Semua activiti defendan berkait dengan RISDA."

Ka'ab bin Alias (PK3), the head of RISDA's policy unit, said that he directed the 1st third party to assume the post as manager of the defendant as the former manager had been transferred to RISDA headquarters. He issued the letter in D6. The 1st third party was an employee of RISDA. The 1st third party had the same powers as the former manager. D4 was issued by RISDA headquarters. Whilst he was the RISDA officer in Segamat, he attended the board meetings of the defendant. A manager must obtain the prior approval of the board. "Tetapi ada juga projek yang dibuat dahulu oleh pengurus dan selepas disahkan kemudian oleh lembaga pengarah." The board had the power to approve or reject a contract. P1(1) was in the format employed by RISDA. Whilst he was the RISDA officer in Segamat, the defendant entered into a similar contract but it was in a different format. The power to enter into contacts similar to the instant agreement vested with the board. A manager appointed by RISDA and or the chairman of the defendant must obtain the approval of the board before he/they could enter into such a contract. At the material time, RISDA required 500,00 seedlings for replanting purposes. Whilst he was the RISDA officer in Segamat, the defendant had supplied seedlings to RISDA, "jumlah tidak besar, dalam 50,000 TCP". Under cross-examination by Mr. Pang, PK3 said that a manager should attend meetings and report to the board. The persons usually empowered to execute a contract for the defendant were the manager or secretary, The common seal was not required to be affixed on the agreement. PK3 did not agree with counsel who suggested that the third parties, as chairman and or manager *per se*, had powers to sign the agreement. Whilst he was the RISDA officer in Segamat, there was no instance of a board rejecting a contract entered into by the manager. Under cross-examination by Mr Sethu, PK3 said that the salary of the manager was paid by RISDA, and that the defendant accepted the manager appointed by RISDA. PK3 was not re-examined.

Mr Sethu submitted along the following lines. The plaintiff was not an outsider. The plaintiff had a copy of the by-laws. By-law 45(r) provided that an agreement must be signed by 3 signatories and affixed with the common seal. DW1's evidence was not challenged. The agreement was void for non-compliance with by-law 45(r). The agreement was not ratified *post facto*. The minutes of the meeting of 26 March 1990 stated that the agreement had not been brought before the board for approval. If those minutes were not correct, why had the 2nd third party who was present at that meeting not corrected those minutes? There was no evidence that the plaintiff purchased the seedlings at RM0.50 per seedling or that the plaintiff suffered a loss of RM170,000. It was the unambiguous testimony of PK3 that the chairman and or manager had no powers to enter into the agreement without prior approval

from the board. There was no evidence that the third parties had the approval of the board. There was no evidence that the agreement was ratified. DW1 testified that the offer and agreement had no approval from the board. At the meeting of 26 March 1990, the 2nd third party did not object to the termination of the agreement. DW2 testified that he advised the defendant to terminate the agreement. The testimony of PK2 should not be accepted. The offer and agreement were void for non-compliance with by-laws 39 and 45(r). The plaintiff should know that the signature of the chairman without the common seal was not good enough. The fact that the plaintiff had the by-laws disqualified the plaintiff from the rule in the *Turquand*'s case (counsel cited *Malaysian Resources Corporation Bhd v. Juranas Sdn Bhd* [2002] 7 CLJ Supp 260). The only signature was that of the chairman. That ought to put the plaintiff on inquiry. The plaintiff was a member of the defendant, and should know of the absence of authority. PK3 testified that the business of the defendant must be brought before the board. There was no evidence that the agreement was ever been brought before the board. Both third parties had no authority. Then counsel submitted that it was held in *Chase Manhattan Bank NA v. Mercantile Co-operative Thrift & Loan Society Ltd* [1992] 2 MLJ 168, 169, that a cooperative society is governed by the Societies Act 1948 and the Rules made thereunder, and by its own by-laws. The management of the defendant was entrusted to a board of 12 members (see by-laws 39). The defence of the defendant is similar to the defence in *Chase Manhattan @* 173. Then having referred to s. 17 of the Societies Act 1948 amended Act, Mr Sethu argued that the plaintiff should be deemed to know that the third parties alone could not bind the defendant.

Mr Pang submitted that the chairman had ostensible authority to execute the agreement. The third parties informed the plaintiff that they had authority. The word "mengikut" in by-law 45(r) should read as "follow" or "comply". By-law 45(r) did not specify that the common seal must be affixed. The third parties were the chairman and manager of the defendant, and the plaintiff was entitled to rely on the fact of the senior positions of the third parties (counsel referred to *Tan Ah Tong v. Perwira Habib Bank (M) Bhd* [1998] 3 CLJ 833). The plaintiff could not have known that the third parties lacked authority. The plaintiff was entitled to assume that the third parties had authority (counsel referred cited *MMC Power Sdn Bhd & Anor v. Abdul Fattah B Mooawan & Anor* [2001] 1 CLJ 207). There was no conduct on the part of the third parties that indicated that the third parties lacked authority. There were prior dealings between the plaintiff and 1st third party. There was no reason for the plaintiff to suspect that the third parties lacked authority. The real reason

for the termination of the agreement was that RISDA would not purchase 500,000 seedlings. The plaintiff could be deemed to know the by-laws but not the internal management. On the crucial day, ie, on 20 February 1990, the plaintiff had no knowledge of the internal management. Evidence on the profit of RM0.35 per seedling was not challenged.

Not unexpectedly, Mr Azmi submitted that the third parties had authority. PK1 and PK2 both said they had authority. PK3 testified that the chairman could act first and that authority would follow. PK3 related that there had not been an instance of the act of the chairman being not ratified. The agreement was terminated later. The real reason for the termination of the agreement was that RISDA would not purchase the seedlings from the defendant. It was the advice of RISDA to terminate the agreement. DW2 said that the reason for the termination of the agreement was that the agreement was not within the payung concept. The agreement was the first case of a written contract by the defendant. It was a *bona fide* act by the third parties, to maintain a written record. By-law 45(r) did not apply.

In parting, Mr Pang said that there was no allegation of any improper motive, Mr Sethu reiterated that the plaintiff was not an outsider, while Mr Azmi remarked that it was pleaded that the 1st third party was only a witness to the agreement.

The agreed issue between the plaintiff and defendant turns upon the rule in *Turquand*'s case, which is a rule of common law, derived from the case of *Royal British Bank v. Turguand* [1855] 5 E & B 248.

Pennington's *Company Law* 2nd edn, at pp. 137-138 expressed the rule in *Turquand*'s case and its limits, in the following terms:

> The rule prescribed that if a person deals in good faith with the board of directors or other representative body of a company which is in fact exercising powers of management and direction of its business and affairs, that person is not affected by defects of procedure within the company or by its failure to fulfil conditions which are required by the company's memorandum or articles to be fulfilled before the act or transaction in question is effected ... The legal basis of the rule is that a person dealing with a company has no right to insist on proof by its directors that the provisions of its memorandum or articles have been complied with, and he cannot therefore be deemed to have constructive notice of some failure to comply which he has no means of discovering (*Gloucester County Bank v. Rudry Merthyr Steam and House Coal Colliery* [1898] 1 Ch 629 at 636 per Lindley LJ). Of course, a person dealing with a company will not be able to rely on the rule, and the company may refuse to be bound by the transaction,

if he knows that there has been some failure to comply (*Howard v. Patent Ivory Manufacturing Co* [1888] 38 ChD 156), or if he knows facts which would lead a reasonable man to enquire further and so discover the failure to comply (*Kanssen v. Rialto (West End) Ltd* [1944] Ch 346). The rule in *Royal British Bank v. Turquand* is designed to protect persons dealing with the company, not to protect the company itself, and so there is no reason why a person who enters into a transaction with a company should not rely on the company's failure to comply with the provisions of its memorandum or articles as a defence when the company sues him, though, here again, if he knows of the failure to comply when the transaction is entered into and the defect is purely procedural, the court may hold that he has waived the his right to object, so that the transaction is binding on both him and the company (*Re Home and Foreign Investment and Agency Co Ltd* [1912] 1 Ch 72).

Company Law by Walter Woon 2nd edn, at pp. 89-90 verbalized the rule in *Turquand*'s case as follows:

The actual authority of an agent is a relationship between principal and agent; the rest of the world is a stranger to this relationship. A third party dealing with the agent of a company does not know what the agent's actual authority is, nor in most cases can he find out. Sometimes the authority of an agent to do certain acts depends on compliance with certain formalities. For instance, it may be provided by the company's articles that the affixing of the company's seal can only be authorized by a resolution of the board. Sometimes, there is some irregularity in the management which vitiates the authority conferred upon an agent. For instance, a directors' meeting may have been irregularly held. A party outside the company has no way of determining whether the company's internal regulations have been complied with. However, the law does not require an outside party to do so. If an agent has apparent authority to do an act, a person dealing with the company is entitled to assume that all matters of internal management and procedure prescribed by the articles have been complied with. This is known as the 'indoor management rule' or the rule in *Turquand*'s case ... The rule in *Turquand*'s case is a presumption of regularity. In other words, a person who deals with a company is entitled to assume that all procedural matters have been taken care of by the company. There is a good practical reason for this: an outsider cannot discover whether the company's internal procedures have been complied with. If a company could get out of a transaction by pleading non-compliance with its internal procedures, commercial certainty would be thrown out of the window.

In short, the rule in *Turquand*'s case provides protection to persons dealing with a company in good faith (see *Standard Chartered Bank v. Central Wood Tiles Sdn Bhd* [1990] 2 MLJ 361, where it was held by Haidar J (as he then was) that the rule in *Turquand*'s case only applies to persons dealing in good faith). An outsider dealing with a company does not need to enquire

into the regularity in the internal affairs and proceedings of the company, and may assume that all is being done regularly (see *K Sivapraaasam Krishnar v. Renominium Development Sdn Bhd & Ors* [1998] 4 CLJ 481).

There are exceptions to the rule. *Palmer's Company Law*, 23rd edn at pp. 343-346 adumbrated the following persons/situations as outside the rule: (i) a person who deals with a company and who is on notice of an irregularity in its internal management in connection with the subject matter of his dealings (*Morris v. Kanssen* [1946] AC 459, 476), (ii) a company, where it has a common officer with that other company, eg, a common director or secretary, and "the common officer had some duty imposed upon him to communicate that knowledge to the other company, and had some duty imposed upon him by the company which is alleged to be affected by the notice [of irregularity] to receive the notice [of irregularity]" (per Vaughan Williams J in *Re Hampshire Land Co* [1896] 2 Ch 743; approved by himself in *Young v. David Payne & Co* [1904] 2 Ch 608), (iii) persons on inquiry, and (iv) where there is forgery.

Company Law by Walter Woon *(supra)* at pp. 92-94 listed the following as situations where a third party cannot rely on the presumption of regularity: (i) if the contracting party knows or should know of the agent's lack of authority, (ii) if an examination of the company's memorandum or articles would have made it plain that the agent's authority was limited, (iii) the nature of the transaction may be such as to put the third party on enquiry as to the agent's authority, and if the contracting party does not make reasonable enquiries, and, (iv) if the contracting party conspires with the company's agent to procure an unauthorized transaction. *Company Law* by Walter Woon *(ibid)* appended the following riders: (i) the fact that the contracting party is a director does not automatically mean that he cannot claim the indoor management rule - it all depends on whether he ought to have known of the agent's lack of authority (*Hely-Hutchinson v. Brayhead Ltd* [1968] 1 QB 549, 578 - 579), and, (ii) a person who deals with a company may be put on notice as to the agents' lack of authority because of the provisions in the memorandum or articles, but it must be clear from the memorandum or articles that the agent could not be authorized or if for some other reason he should have been suspicious (*Rolled Steel Products (Holdings) Ltd v. British Steel Corp* [1984] BCLC 466).

Edgar Joseph Jr FJ in *Pekan Nanas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793, marked out the limits of the rule in *Turquand*'s case as follows:

> To put it another way, such an outsider may rely on the rule in *Turquand*'s case which, when it applies, gives rise to an irrebutable presumption, so that the company concerned is debarred from establishing or relying on the fact that the proceedings were irregular and unauthorized.
>
> The rule in *Turquand*'s case cannot, however, be invoked by an outsider who knows or ought to know that there is an irregularity.
>
> More particularly, outsiders dealing with a company who know that some relevant procedure internal to the company has not been followed cannot invoke the benefit of the indoor management rule (see *Howard v. Patent Ivory Manufacturing Co* [1888] 38 Ch D 156). This is an exception to the rule in *Turquand*'s case and the burden of establishing it lies on the party invoking the exception and in this case, that would be the Father and his faction. Furthermore, outsiders dealing with a company could also be affected by knowledge of facts which would put a reasonable person on inquiry, in other words, they would be deemed to know what a reasonable person would infer from known facts. So, for example, in *B Liggett (Liverpool) Ltd v. Barclays Bank Ltd* [1928] 1 KB 48 at pp. 56-56, Wright J (as he then was) said:
>
> > ... Whatever may be the exact scope of the rule in *Turquand*'s case, I think it is quite clear on principle and on the authorities I have already referred to that it can never be relied upon by a person who is put on inquiry. The rule proceeds on a presumption that certain acts have been regularly done, and if the circumstances are such that the person claiming the benefit of the rule is really put on inquiry, if there are circumstances which debar that person from relying on the *prima facie* presumption, then it is clear, I think, that he cannot claim the benefit of the rule ... .
>
> And, in *Morris v. Kanssen & Ors* [1946] AC 459, Lord Simonds made it clear that an outsider cannot invoke the benefit of the *Turquand* rule if he is put upon inquiry. Here is what his Lordship said on this point (at p. 475):
>
> > ... He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done.
>
> So also, an outsider dealing with a company cannot invoke the benefit of the *Turquand* rule if he could or should in the circumstances have discovered the defect by inspecting the compulsory documents filed at the Registry of Companies which are open to public inspection. (See *Irvine v. Union Bank of Australia* [1877] 2 App Cas 366).

The material time at which there must be knowledge or the means of knowledge is the time of entry into the transaction. (See *Kanssen v. Rialto (West End) Ltd & Ors* [1944] Ch 346; *Morris v. Kanssen & Ors* [1946] AC 459).

We need hardly add that the rule in *Turquand*'s case is designed to protect not the company itself but persons dealing with the company. It follows that there is no reason why persons, including outsiders, who enter into transactions with a company, and who are sued should not invoke the benefit of the rule as a defence. (See *Howbeach Coal Co Ltd v. Teague* [1860] 5 H & N 151, 157 ER 1136; *Garden Gully United Quartz Mining v. McLister* [1875] 1 App Cas 39).

So far as the burden of proof is concerned, when the doctrine of the *bona fide* purchaser for value without notice is invoked, we are inclined to the view that the burden of showing lack of notice is on the person invoking the doctrine. (See *Ninety-Five Pty Ltd v. Banque Nationale de Paris* [1988] WAR 132; *Re Dover Pty Ltd* [1981] 6 ACLR 307 at p 310).

Whether or not the outsider was put on notice is a question of fact on which other cases are of no assistance.

...

The very nature of a proposed transaction may put a person on inquiry as to the authority of the directors to effect it even if he has no special relationship with the company, (see *Rolled Steel Products (Holdings) Ltd v. British Steel Corp & Ors* [1986] Ch 246 at 285) ...

Whether in any given case the person dealing with a company is put upon inquiry must depend upon all the circumstances (per Glade LJ in *Rolled Steel Products (Holdings) Ltd* at p. 285).

In the instant case, the defendant contended that the third parties lacked authority while the third parties contended to the contrary. The plaintiff contended neither. If at all, the plaintiff tacitly conceded that the third parties lacked authority, as the rule in *Turquand*'s case would not be sought to be invoked, if the internal affairs and or proceedings of the defendant were regular. As between the plaintiff and defendant, it would work out, since agreed issue (1) turns upon the rule in *Turquand*'s case, that the plaintiff tacitly conceded that the third parties lacked authority. The pertinent question is whether the plaintiff was aware or should be deemed so when he entered into the agreement on 20 February 1990 that the third parties lacked authority. Mr Sethu argued that the plaintiff was aware or should be deemed so. Mr Sethu argued so on the basis that the plaintiff was a member of the defendant and had a copy of the by-laws of the defendant, the facts of which are not in dispute. But "a member of a company is not outside the protection

of the rule simply because he is a member" (*Pennington's Company Law (supra)* at p. 151, citing *Barqate v. Shortridqe* [1855] 5 HL Cas 297; *Re British Provident, Life & Assurance Society, Grady*'s Case [1863] 1 De GJ & Sm 488). Even a director is not automatically beyond the protection of the rule (*Hely-Hutchinson v. Brayhead Ltd* [1968] 1 QB 549, 578 - 579). It all depends on whether the member or director in fact knew or ought to know of the agent's lack of authority. Mr Sethu also argued that the plaintiff ought to know the by-laws. Indeed, the plaintiff ought to know by-law 45(r), as the plaintiff had a copy of the by-laws. Mr. Sethu contended that by-law 45(r) required three signatories and common seal. The instant agreement had the signature of only the chairman (2nd third party) and witnessed by the manager (1st third party). In any event, what were required to done under by-law 45(r), now reproduced below together with the whole of the said by-law 45.

45. KUASA-KUASA DAN KEWAJIPAN LEMBAGA PENGARAH

Lembaga Pengarah mempunyai kuasa-kuasa, kewajipan dan tugas-tugas yang berikut:

(a) Menerima ahli-ahli baru di bawah Undang-undang kecil 8.

(b) Mengesahkan pindaan saham-saham di bawah Undang-undang kecil 21.

(c) Memilih diantara mereka seorang pengerusi, seorang setiausaha, dan mempersetujui perlantikan Pegawai RISDA sebagai Pengurus Besar dan menyerahkan kepadanya kuasa dan tanggongjawab seperti yang terkandong di dalam undang-undang Kecil 51. Jika perlu mereka bolehlah melantik seorang Pegawai yang bergaji tetap atau sebuah firma setiausaha-setiausaha, dan akauntan-akauntan bagi menjalankan tugas-tugas setiausaha dengan syarat ianya tidak boleh menjadi ahli Lembaga Pengarah.

(d) Menyimpan dengan benar dan betulnya segala akaun bagi semua wang yang diterima dan dibelanjakan.

(e) Menyimpan dengan betulnya segala akaun berkenaan dengan harta-harta dan tanggungan-tanggungan.

(f) Mempastikan segala akaun dan membenarkan perbelanjaan dan mengawasi supaya segala buku-buku, daftar-daftar dan dokumen-dokumen yang ditetapkan itu diuruskan dengan sempurnanya.

(g) Membentangkan kepada Mesyuarat Agung Tahunan akaun perniagaan, akaun untung dan rugi dan lembaran imbangan yang telah diodit dan diluluskan oleh Ketua Pendaftar dan lapuran tahunan Lembaga Pengarah.

(h) Menimbangkan penyata atau surat-surat Ketua Pendaftar atau wakilnya dan mengambil langkah-langkah yang patut ke atasnya.

(i) Menyimpan segala buku-buku dan dokumen-dokumen lain dengan selamatnya.

(j) Memenuhkan jawatan-jawatan kosong yang berlaku di dalam Lembaga Pengarah dari masa ke semasa hingga ke Mesyuarat Agung Tahunan yang akan datang.

(k) Memanggil Mesyuarat Agung mengikut Undang-undang kecil ini.

(I) Membuat perjanjian bagi mendapatkan pinjaman-pinjaman tertakluk kepada kebenaran Mesyuarat Agung dan Ketua Pendaftar.

(m) Dengan mengeluarkan surat-surast resmi, melantik, menggantung, membuang kerja, menetapkan kewajipan-kewajipan pekerja-pekerja, menetapkan gaji, bonus dan bayaran-bayaran lain bagi mereka dan mendapatkan jaminan yang cukup bagi kesempurnaan menjalankan kewajipan-kewajipan mereka.

(n) Menerusi mana-mana ahli Lembaga Pengarah atau pegawai-pegawai koperasi atau seorang yang dilantik, oleh mereka dengan bertulis bagi maksud ini, mengadu, menjalankan, membela, menyelesai menyerah kepada timbangtara atau memberhentikan sebarang perbicaraan mahkamah yang dibuat oleh koperasi ini atau yang didakwa ke atas koperasi ini atau Lembaga Pengarah atau pegawai-pegawai yang berkenaan hal ehwal koperasi ini.

(o) Membeli saham-saham bagi pihak koperasi ini dari koperasi-koperasi yang berdaftar.

(p) Mengkaji merancang dan melaksanakan projek-projek yang difikirkan akan menguntung dan memajukan koperasi ini mengikut tujuan-tujuan di bawah undang-undang kecil 4 dan melapurkan kepada Mesyuarat Agung.

(q) Menjalankan rancangan-rancangan atau projek-projek dalam mana-mana mukim atau kawasan dalam lingkungan kawasan perjalanan koperasi ini, dan meminta ahli-ahli yang bersetuju mengambil bahagian di dalamnya menyumbangkan penambahan modal dengan cara saham, pelaburan, pertaruhan, dan lain-lainnya mengikut syarat-syarat yang diputuskan oleh Lembaga Pengarah.

(r) Mengikut perjanjian-perjanjian dan/atau memberi gantirugi pihak koperasi ini yang mana hendaklah dimetrikan dengan mohor koperasi ini dan ditandatangani oleh pengerusi, setiausaha dan Pengurus besar atau mereka-mereka yang diberi kuasa oleh Lembaga Pengarah.

(s) Melantik diantara ahli-ahli Lembaga Pengarah seorang atau lebih wakil-wakil kerana menghadiri mesyuarat sebuah koperasi yang berdaftar yang koperasi ini menjadi ahlinya.

(t) Melantik diantara mereka sebarang Jawatankuasa Kerja atau Jawatankuasa Kecil bagi menjalankan dengan sempurnanya perniagaan koperasi ini dan menyerah sebarang kuasa kepadanya dari masa ke semasa mengikut keputusan Lembaga Pengarah.

(u) Melantik Jawatankuasa Cawangan bagi menjalankan dengan sempurnanya perniagaan koperasi disesebuah PPPK dan menyerah kepadanya sebarang kuasa dari masa ke semasa mengikut keputusan Lembaga Pengarah. Penyerahan kepada Jawatankuasa Cawangan hendaklah direkodkan dalam dokumen - dokumen yang tertentu yang ditandatangani oleh pihak penyerah dan pihak penerima.

(v) Menjemput seorang kenamaan untuk menjadi yang Di Pertua Koperasi ini.

(w) Membeli, menjual, memindah hakmilik, mendiri, sewa menyewa, cagar mencagar, pajak memajak dan memiliki harta-harta yang tidak boleh dianjak, seperti tanah, bangunan, ladang dan lain-lainnya, dan harta-harta yang boleh dianjak bagi faedah koperasi ini tertakluk kepada peruntukan-peruntukan Ordinan dan kaedah-kaedah yang dibuat dibawahnya.

(x) Membuat peraturan-peraturan dari masa ke semasa bagi menjalankan sesuatu projek koperasi ini.

(y) Mengesyurkan elaun-elaun kepada Juruodit Dalam.

(z) Menjalankan lain-lain tugas dan kewajipan yang tertakluk kepada Ordinan dan keadah-kaedah yang dibuat di bawahnya.

Only by-law 45(r) had to do with the subject of an agreement of the defendant. In English, by-law 45(r) provided that the board shall "comply with agreements and/or give compensation of this cooperative in which (yang mana) it has to be sealed with the common seal and signed by the chairman, secretary and general manager or by the persons empowered by the board". But it could hardly be said that it was clear from by-law 45(r) that an agreement had to be sealed with the common seal and signed by the chairman, secretary and general manager or by the persons empowered by the board. In the first place, it was not clear that the proviso "yang mana hendaklah dimetrikan dengan mohor koperasi ini dan ditandatangani oleh pengerusi, setiausaha dan pengurus besar atau mereka-mereka yang diberi kuasa oleh Lembaga Pengarah" applied to the phrase "mengikut perjanjian-perjanjian". Even if it applied, it was still open to interpretation that the proviso applied to the act "mengikut perjanjian-perjanjian" but not the subject matter "perjanjian-perjanjian". It was also open to interpretation that the proviso only applied to the phrase "memberi gantirugi pihak koperasi ini" but not to the phrase "mengikut perjanjian-perjanjian". The point is that it was not clearly specified in by-law 45(r) that an agreement

must be sealed with the common seal and signed by three signatories. Hence, it would not be right to say that the by-laws put the plaintiff on notice of the required seal and three signatories.

According to the plaintiff, the 1st third party informed him that the third parties had authority to enter into the agreement, and that he accepted the word for it that the third parties had authority - "Semasa menandatangani perjanjian tersebut, Pengurus Koperasi ada memberitahu saya bahawa beliau dan pergerusi ada kuasa untuk tandatangan perjanjian tersebut. Pengurus seorang yang memberitahu saya ... Saya rasa mereka ada kuasa". Nevertheless, the pertinent question is whether the plaintiff ought to suspect that something was amiss. What were the surrounding circumstances in the instant case? In relation thereto, the evidence painted the following. RISDA would secure the seedlings required for distribution to smallholders from its nursery and or from 'contractors'. The defendant was one such contractor. The defendant would secure the seedlings ordered or asked for by RISDA from one its members. The defendant would sell those seedlings to RISDA at a profit. Meantime, RISDA, who was also the advisor to the defendant, would appoint one of its employees as general manager (GM) of the defendant. On 24 December 1988 (see D6), RISDA directed the 1st third party to assume duties as GM of the defendant. RISDA paid the salary of the GM who was not an employee of the defendant. The GM managed the activities of the defendant. According to DW2, an independent witness, the GM would report to and take instructions from RISDA headquarters. According to PK3, another independent witness who held a senior position in RISDA, the board was the ultimate authority from which the GM must seek approval, "tetapi ada juga projek yang dibuat dahulu oleh Pengurus dan selepas disahkan kemudian oleh lembaga pengarah."

But PK3 also related that the defendant had in the past entered into written contracts similar to the instant agreement, that the persons usually empowered to sign contracts for the defendant were the GM or secretary, that the common seal was not required to be affixed on those contracts, and that there was no instance of the board rejecting a contract entered by the GM whilst he was the RISDA officer in Segamat

It must appear to be so that the GM was a most senior administrator of the defendant. Appointed to administer the affairs of the defendant by RISDA to which the defendant was dependent if not beholden for 'contracts', it could be imagined that the GM was probably the most influential if not the most powerful figure in the hierarchy of the defendant (see *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors* [1995] 3 CLJ 639, where it

was remarked by the Court of Appeal per Gopal Sri Ram JCA, that an outsider who deals with an individual low in the corporate hierarchy cannot take advantage of the rule in *Turquand*'s case), notwithstanding the fact that the GM was not a member of the board. The GM was not unlike a special administrator of the defendant, whose every act in the affairs of the defendant carried the weight and authority of his special position in the defendant. Given so, it could not have appeared to the plaintiff that the offer [P1(1)] from the GM could yet lack the approval of the board. In fact, given the special position of the GM, it would only have been both logical and natural to assume that all were being done regularly. That it was the chairman of the board who executed the agreement would have appeared as the final seal of approval and that would have doubly assured the plaintiff that all were being done regularly. According to PK3, previous contracts were not sealed with the common seal. Hence, the want of a common seal, not for the first time, would not have put the plaintiff on inquiry. All said and done, there was no circumstance that ought to put the plaintiff on inquiry. In relation to actual knowledge, the truth is that there was absolutely no evidence that the plaintiff knew at the material time that there had been some failure in the internal procedure, or that the plaintiff knew at the material time facts which would lead a reasonable man to enquire further and so discover the said failure. In a word, there was no evidence of bad faith. An irregularity in the internal procedure was shown. But not one exception to the rule in *Turquand*'s case was made out by the defendant (see *Pekan Nanas*, where it was held by the Federal Court that the burden of establishing the exception lies on the party invoking it). Yes, the rule in *Turquand*'s case applies. Accordingly, the plaintiff's claim is allowed.

The plaintiff capped his quantum of damages to RM0.35 per seedling. The plaintiff gave a detailed breakdown of his cost, and he was not challenged. From the other parties, there was no other evidence on the cost. It would work that there is no material to disagree with the plaintiff.

In relation to what is consequently the remaining issue (3), the answer lies in the by-laws. By-law 50(1) charged the chairman with duties, to chair meetings and to ensure that the operations of the defendants do not offend written law and the by-laws of the defendant. By-law 48 charged the members of the board to discharge their duties to the best of their ability and to indemnify the defendant against all losses that could be suffered by the defendant on account of any negligence on their part. There was no power to the chairman to execute an agreement without the prior approval of the board. In the absence of such express power, the 2nd third party could not enter into the agreement

without the approval of the board (for an analogy, see *Tan Chiw Thoo v. Tee Kim Kuay* [1997] 2 MLJ 221 where it was said by the Federal Court per Peh Swee Chin FJ that "power or jurisdiction, generally, must be express in, or implied irresistibly from any legislation and is not to be inferred lightly from it).

In line with the agreed results, it is hereby ordered that the defendant do pay the plaintiff the sum of RM175,000 together with interests and costs. And by way of a full indemnity to the defendant, it is further ordered that the third parties do pay the defendant the sum of RM175,000 together with interests and costs.